# STATE OF HAWAII DEPARTMENT OF EDUCATION OFFICE OF SCHOOL FACILITIES AND SUPPORT SERVICES Honolulu, Hawaii 96809

Board of Land and Natural Resources State of Hawaii Honolulu, Hawaii

OAHU

PSF No.: 03OD-292

Special Acquisition of Private Lands and Set Aside to Department of Education for Educational Purposes, Honouliuli, Ewa, Island of Oahu, City and County of Honolulu, Tax Map Key: (1) 9-1-069:027.

#### APPLICANT AGENCY:

Department of Education

#### PRIVATE LANDOWNER:

Gentry Homes, Ltd., a domestic profit corporation whose business and mailing address is P.O. Box 295, Honolulu, HI 96809

#### LEGAL REFERENCE:

Sections 107-10, 171-11, 171-30, and 302A-1601, Hawaii Revised Statutes, as amended.

#### LOCATION:

Privately-owned lands of Gentry Ewa Makai situated at Honouliuli, Ewa, City and County of Honolulu, Island of Oahu, identified by Tax Map Key: (1) 9-1-069:027, as shown on the attached map labeled Exhibit A.

#### OWNERSHIP:

Tax Map Key No. (1) 9-1-069:027 Gentry Homes, Ltd.

#### AREA:

18.670 acres, more or less.

#### ZONING:

State Land Use District: Urban City & County of Honolulu CZO: Apartment (A-1)

#### CURRENT USE:

The Department of Education is constructing classroom buildings and related facilities under a Right of Entry with Gentry Homes, Ltd.

# **CONSIDERATION:**

None. Private landowner is donating the subject lands at no cost to the State.

#### PURPOSE:

Serves as the campus of a new middle school.

#### CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

The Final Environmental Assessment for the subject project was published in the OEQC's Environmental Notice on 12/23/2008 with a finding of no significant impact (FONSI).

#### DCCA VERIFICATION:

Place of business registration confirmed:	YES _>	COM
Registered business name confirmed:	YES >	NO
Applicant in good standing confirmed:	YES 3	NO

#### APPLICANT REQUIREMENTS:

Applicant has met the following requirements as stated in the Board of Land and Natural Resources July 15, 2008 Letter with Reference No. PSF 030D-292:

- 1. Applicant has obtained subdivision approval of the subject property as evidenced by the Department of Planning and Permitting's March 10, 2006 letter approving DPP File No. 2004/Sub-227.
- 2. Applicant has provided a copy of Land Court Map 1304, Land Court Application No. 1069, which was approved by the State Land Surveyor on May 31, 2006.
- 3. Applicant has submitted a title report for the subject property, issued by First American Title Company dated June 3, 2010.
- 4. Landowner conducted and submitted two Phase 1 environmental site assessments, dated July 3, 2008 and April 29, 2009, neither of which identified the potential for hazardous materials release or the presence of hazardous materials. Applicant conducted a Phase II environmental site assessment, dated October 23, 2008, which concluded that recognized environmental conditions do not exist

within the subject property and that no further investigation was recommended. Applicant conducted follow-up soil sampling report at the request of the Hawaii Department of Health (HDOH) in February 2009. HDOH then issued a letter of No Further Action (NFA) for the school site on March 3, 2009, a copy of which is attached and labeled Exhibit B. (Applicant thereafter took occupancy of the property pursuant to a Right of Entry to construct the school facilities.) Applicant is prepared to obtain an updated Phase 1 environmental site assessment for the property prior to the conveyance to the State.

#### **REMARKS:**

An Education Contribution Agreement ("Agreement") was executed on July 23, 2003, between Gentry Homes, Ltd. ("GHL") and the Department of Education ("DOE") for a school site in Gentry Ewa Makai, a 283-acre private residential development in Honouliuli, Ewa, on the Island of Oahu. In the Agreement, based on a total of 1,865 residential units, GHL agreed to dedicate 18 acres of land, more or less, to the State of Hawaii as an educational contribution to satisfy the DOE's fair-share requirement for school development to serve the planned Gentry Ewa Makai residential project.

The Agreement limits use of the designated school site for public school and ancillary school recreational uses. The DOE is building a middle school campus with school opening slated for the middle of the 2010-2011 school year. GHL granted to DOE a right of entry to construct the school, effective as of February 20, 2009. A copy of the Right-of-Entry Agreement ("ROE") is attached as Exhibit C. GHL and the DOE amended the ROE twice in 2010. The first amendment to the ROE extended the ROE to July 1, 2010. The second amendment to the ROE extends the ROE to August 31, 2010. Both of these amendments to the ROE are included as part of Exhibit C.

This capital improvement project was approved by the Board of Education at its meetings of October 6, 2005 and October 5, 2006. Funding for design and construction of the new middle school was appropriated by the Hawaii State Legislature through Act 160, SLH 2006 (\$3,787,000); Act 213, SLH 2007 (\$66,883,000); and Act 158, SLH 2008 (\$800,000).

Agency comments: Comments were solicited from the following State agencies: Department of Hawaiian Home Lands, Department of Transportation Highways Division, and Office of Hawaiian Affairs; and agencies of the City & County of Honolulu: Department of Planning, Department of Environmental Services, and the Board of Water Supply. None had any comments or objections regarding the proposed school site.

The Board previously approved the acquisition of the subject property at its meeting on July 11, 2008 (PSF No. 030D-292) and

provided that the property shall be deeded to the State "subject to the standard terms and conditions of the most current deed document form, as may be amended from time to time". Certain terms and conditions in that deed form are not applicable to this acquisition because the State has been in possession of the property since February 2009, constructing the middle school campus. Specifically, the standard deed form provides that the grantor (in this case, Gentry Homes) shall be responsible for any hazardous materials testing and for conducting a Phase I environmental site assessment no later than 30 days before the effective date of the deed. Prior to transferring possession of the property to the Department of Education under the ROE, Gentry had a Phase I environmental assessment prepared and updated and provided those studies to the State. Because the State has had possession of and has made substantial changes to the property since that time, GHL does not believe it should be responsible for any further hazardous materials testing of the site. that DOE signed specifically provides that "The STATE [DOE] shall comply with all applicable laws, statutes, ordinances, rules and regulations, including all environmental requirements, relating to the STATE's construction and other use of the Property. addition, once the STATE [DOE] commences work on the Property pursuant to this Agreement, GRANTOR shall not be responsible for conducting any further environmental assessments for the Property, and the STATE [DOE] shall be responsible for any hazardous materials used or released on or near the Property by STATE or its agents, employees or consultants."

The ROE mentioned above was entered into solely by the DOE and its lawyers; that ROE is not the DLNR's standard form ROE, and neither the DLNR, BLNR nor any of its attorneys reviewed or approved that ROE signed by the DOE. Accordingly, in the event that the subject property later turns out to have any hazardous materials or environmental conditions, then it is only fair that the DOE bear that responsibility and liability, and not the BLNR, DLNR nor the State.

The GHL is proposing a special deed form (deviation from the standard DLNR/BLNR form), which is attached as Exhibit "D", does not require the Landowner to be responsible for further environmental testing. The Applicant (DOE) has agreed to waive that requirement.

We would like to point out that the Land Board previously allowed a deviation from the "standard deed form" when Haseko (Ewa), Inc. deeded 11.725 acres of land for the then proposed Ocean Pointe Elementary School to the State of Hawaii in 2005. (See Exhibit E.) Haseko's deed form was used as a template in drafting Gentry's proposed deed form.

In addition, Landowner needs to reserve rights to effect dedications of various easements on the property for drainage,

sewer, landscaping and other purposes. The standard deed form did not provide for such reservations; the proposed deed form attached as Exhibit D does. In addition to GHL reserving the right to grant all these different type of easements on the subject property, the Title Report (see last Exhibit attached to this Submittal) indicates that the subject property has a number of encumbrances for easements, use restrictions and even Declarations of Covenants, Conditions and Restrictions (CCRs) that typically require a careful study to determine whether any of these encumbrances contain provisions that simply cannot be accepted by the State (such as waiver of liabilities, indemnities by the grantee back to the grantor, etc.). Since DOE staff (and not DLNR staff) conducted its own due diligence of these encumbrances and the environmental conditions, the DOE (and not the DLNR, BLNR nor the State) should be responsible and liable for any problems that arise from the encumbrances or environmental conditions on the site.

Except as noted herein above, and other than the change in the form of the deed and an updating of the Applicant Requirements (all of which have been satisfied), there are no other changes to the application that was approved by the Board at its July 11, 2008 meeting.

## RECOMMENDATION: Subject to the above, that the Board:

- 1. Authorize the acquisition of the subject private lands subject to the following:
  - A. The terms and conditions of the deed document form that is attached to this application as Exhibit C;
  - B. Review and approval by the Department of the Attorney General;
  - C. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
- 2. Approve of and recommend to the Governor the issuance of an executive order setting aside the subject lands to the Department of Education subject to the following:
  - A. The standard terms and conditions of the most current executive order form, as may be amended from time to time;
  - B. Special recitals and conditions to be added to the executive order to make it clear that the DOE (and not the DLNR nor the State) shall be responsible, accountable and ultimately liable for any problems that may arise from encumbrances on the property or

the environmental conditions on the site, as noted herein above.

- C. Disapproval by the Legislature by two-thirds vote of either the House of Representatives or the Senate or by a majority vote by both in any regular or special session next following the date of the setting aside;
- D. Review and approval by the Department of the Attorney General; and
- E. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted

Kathryn S./Matayoshi/ Interim Superintendent

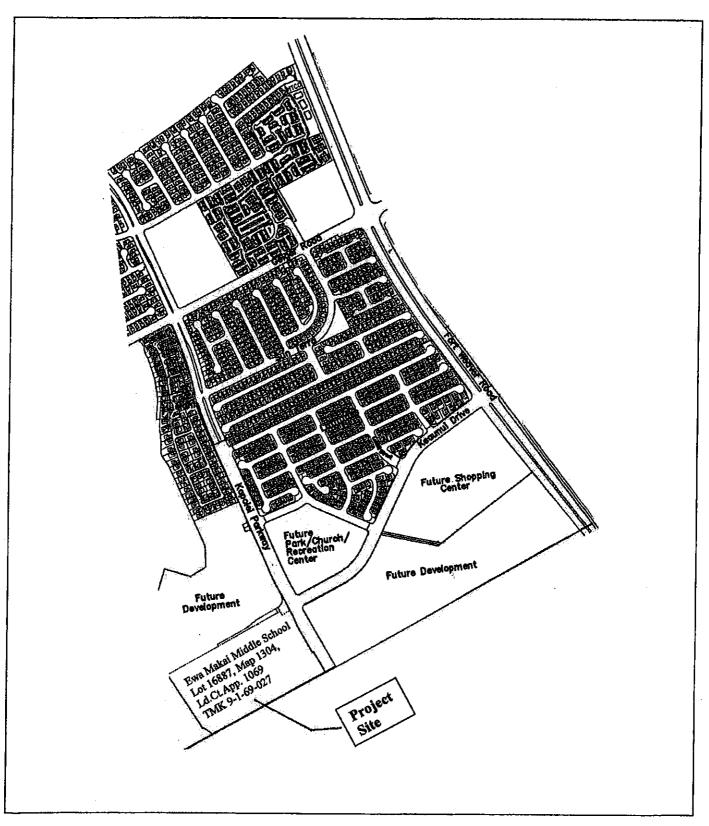
APPROVED FOR SUBMITTAL:

Laura H. Thielen, Chairperson

Exhibit "A"
Map of subject property, TMK (1) 9-1-069:027

# **EXHIBIT "A"**

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#### RIGHT-OF-ENTRY AGREEMENT

THIS AGREEMENT, executed on the respective dates indicated below, is effective as of 2-20-09, between the Department of Education, State of Hawaii (hereinafter referred to as the "STATE"), by its Superintendent, and GENTRY HOMES, LTD., a Hawaii corporation (hereinafter referred to as the "GRANTOR").

#### WINESSETH THAT:

WHEREAS, the STATE requires a temporary entry into certain property owned by the GRANTOR located at Honouliuli, District of Ewa, Oahu, State of Hawaii and more particularly described as Lot 16887, Map 1304, Land Court Application No. 1069, Tax Map Key No. (1) 9-1-69-027 (hereinafter referred to as the "Property"), for a public works project, known as the Ewa Makai Middle School (hereinafter referred to as the "Project"), attached hereto as shown on Exhibit "A", and incorporated herein by reference, together with reasonable access thereto along existing roads as identified on the attached Exhibit "A" (the "Access Route"), for the public purpose of conducting construction activities on the Property.

WHEREAS, the STATE is desirous of obtaining immediate entry onto the area shown on Exhibit "A" for construction on the school site prior to the transfer of title; and

WHEREAS, the GRANTOR is desirous of cooperating with the STATE; and

NOW, THEREFORE, in consideration of the promises contained herein, the STATE and GRANTOR agree as follows:

- 1. Grant of Entry. The GRANTOR hereby grants to the STATE, its agents, officers, employees and consultants, permission to enter upon the Property for the purpose of constructing the Project. The STATE shall notify Darian Chun, the Grantor's representative, at 447-8592, at least forty-eight (48) hours prior to the initial entry onto the Property.
- on the Property, the STATE shall be responsible for damages or injury caused by the STATE's agents, officers, employees and consultants in the course of their employment or entry into the Property to the extent that the STATE's liability for such damage or injury has been determined by a court or otherwise agreed to by the STATE, and the STATE shall pay for such damage or injury to the extent permitted by law. The STATE shall be solely responsible for payment of its consultants and shall remove any liens on the Property that result from the failure to make any such payments. GRANTOR shall not be liable to STATE or its consultants or to any other person or entity, in any way as a result of STATE's or its consultants entering and/or conducting activities on any portion of the Property. GRANTOR shall not be liable to STATE or STATE's agents, employees or contractors for damage or injury arising out of their entry onto the Property or conducting of tests or activities on the Property except to the extent Grantor's liability for such damage or injury has been determined by a court or otherwise agreed to by the GRANTOR. The STATE shall comply with all applicable laws, statutes, ordinances, rules and regulations,

including all environmental requirements, relating to the STATE's construction and other use of the Property. In addition, for the duration of this agreement, once the STATE commences work on the Property pursuant to this Agreement, the STATE shall be responsible for conducting any further environmental assessments for the Property that are required by the STATE, and the STATE shall be responsible for any hazardous materials used or released on or near the Property by the STATE or its agents, employees or consultants. The STATE shall promptly address all complaints from homeowners and other users of neighboring properties relating to the dust, noise, traffic and other concerns arising out of the STATE's construction and other activities on the Property by contacting the originator within two business days of being notified about the complaint.

- 3. <u>Insurance</u>. The STATE shall require its consultants for the Project to purchase and maintain at their expense, the following insurance, naming the GRANTOR as an additional insured, for the term of the Right-of-Entry Agreement:
- a. <u>CGL Policy</u>. Comprehensive General Liability Insurance, including automobile accident liability, contingent liability, contractual liability, and products and completed operations with a combined minimum single limit of One Million Dollars (\$1,000,000.00) per occurrence for bodily injury, personal injury, and property damage and general aggregate limit of Two Million Dollars (\$2,000,000.00) for bodily injury and personal injury. If the policy is written on a "claims made" form, it shall provide for an extended reporting period of not less than three (3) years.
- b. <u>Workers' Compensation</u>. Workers' Compensation Insurance as required by applicable law.
- c. <u>Employer's Liability Coverage</u>. Employers' Liability Insurance with limits of liability no less than the minimum single limit of One Hundred Thousand Dollars (\$100,000.00).
- d. <u>Business Automobile Insurance</u>. Business auto liability insurance with a limit of not less than \$1,000,000.00 per each accident. Such insurance shall cover liability arising out of any auto (including owned, hired and non-owned autos).
- Workers' Compensation Policy) shall name the GRANTOR as an additional insured. Prior to entry on the Property, and hereafter within thirty (30) days prior to expiration of any policy providing insurance required by this Agreement, the STATE shall cause its consultants to furnish Grantor with a certificate(s) of insurance, including a copy of the additional insured endorsement naming STATE, Grantor and a copy of the policy declarations page, executed by a duly authorized representative of each insurer, setting out compliance with the insurance requirements set forth above. All certificates shall provide for 30 days written notice to STATE and GRANTOR prior to the cancellation or material change of any insurance referred to therein. The words "endeavor to" and "but failure to mail such notice shall impose no obligation or liability of

any kind upon the company, its agents or representatives" shall be deleted from the cancellation provision of all certificates provided by the STATE's consultants.

- 5. <u>Cooperation</u>. The STATE shall coordinate with GRANTOR so that the STATE's activities on the Property, including the activities of the STATE's consultants, in, on, or connected with the Property, do not unreasonably interfere with Grantor's activities on the Property and adjacent lands owned by GRANTOR.
- 6. Term. The term of this Agreement shall be twelve (12) months from the effective date of this Agreement or upon transfer of title to the STATE, whichever occurs earlier, unless sooner terminated by the STATE or GRANTOR. If this Agreement terminates prior to transfer of title to the STATE, then the STATE shall promptly remove all improvements that it has constructed on the Property, unless GRANTOR has waived such requirement in writing.
- 7. <u>Heading, captions</u>. The headings and captions used herein are for convenience of reference only and are not to be used to construe, interpret, define, or limit the paragraphs to which they may pertain.
- 8. Binding effect. The terms "GRANTOR" wherever used herein shall include GENTRY HOMES, LTD., its successors and assigns, and the term "STATE" wherever used herein shall include the State of Hawaii and its consultants. The term "consultant" shall include licensed contractors hired by the STATE for the construction of the Project. This instrument shall be binding upon and shall insure to the benefit of the GRANTOR and the STATE.
- 9. <u>Amendment</u>. This Agreement shall not be amended except in writing signed by the parties.

[REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, the parties execute this Agreement by their signatures, on the dates below, to be effective as of the date first above written.

STATE OF HAWAII

Patricia Hamamoto Its Superintendent

Date\_

APPROVED AS TO FORM: Mr.

Deputy Attorney General

Date: 02/19/09

**GRANTOR:** 

Gentry Homes, Ltd., a Hawaii corporation

Its Wee President

Dawn Suyenaga

Vice President/Secretar

# STATE OF HAWAII ) ss. CITY AND COUNTY OF HONOLULU )

On February 18, 2009, before me appeared ROBERT W. BRANT and DAWN SUYENAGA, to me personally known, who, being by me duly swom, did say that they are the President and the Vice President/Secretary, respectively, of GENTRY HOMES, LTD., a Hawaii corporation, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and the said officers acknowledged said instrument to be the free act and deed of said corporation.

Doc Dated:



COLETTE L. ANDRADE-FUJI Notary Public, State of Hawali My Commission Expires: July 17, 2012



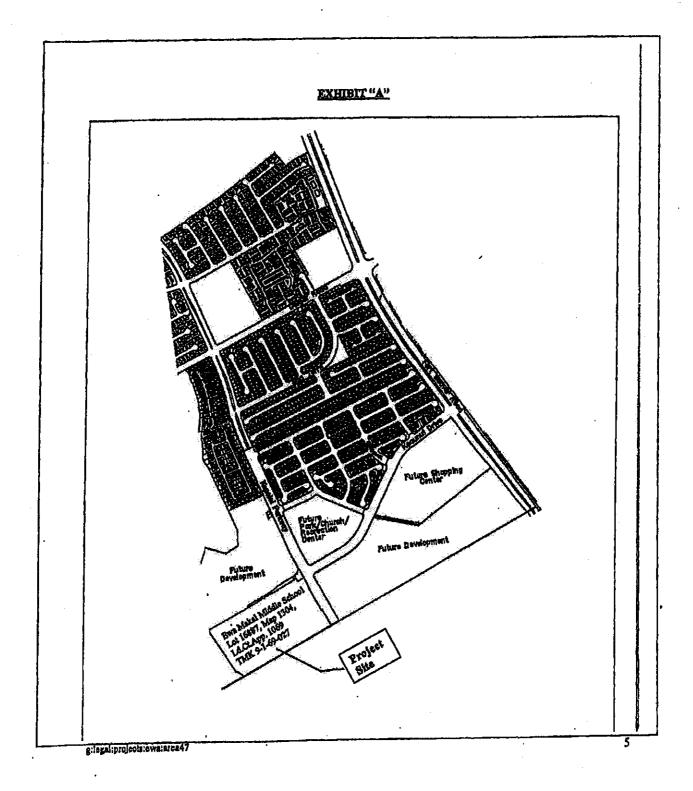
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FEB 1 8 2009

Name: COLETTE L. ANDRADE-FUJII - First Circuit

Doc. Description: Right of Entry Agreement; Project No. NSA-D08-192 (Honoulluli Ewa ROE for construction).

nature Date
NOTARY CERNIFICATION



# FIRST AMENDMENT TO THE RIGHT-OF-ENTRY AGREEMENT FOR EWA MAKAI MIDDLE SCHOOL

#### WITNESSETH

Whereas, the DOE and the GRANTOR entered into a Right of Entry Agreement on February 20, 2009 (referred to herein as the "Agreement") for property located at Honouliuli, District of Ewa, Oahu, State of Hawaii, Tax Map Key No. (1) 9-1-69-027 (hereinafter referred to as the "Property"), pursuant to which the STATE received temporary entry into the Property owned by the GRANTOR, to construct the public works project known as the Ewa Makai Middle School (hereinafter referred to as the "Project".)

Whereas, the term of the Agreement ends on February 20, 2010, or upon transfer of title of the Property to the STATE, whichever occurs earlier; and

Whereas, construction of the school will not be completed by February 20, 2010; and

Whereas, the transfer of title to the Property to the STATE will not be completed by February 20, 2010; and

Whereas, the Agreement may be amended in writing signed by the parties;

NOW THEREFORE, the GRANTOR and the STATE agree to amend the Agreement as follows:

- 1. The first sentence of Section 6 of the Agreement is hereby amended and replaced with the following:
- 6. Term. The term of this Agreement shall commence on the effective date of this Agreement and shall end on July 1, 2010, or upon transfer of title to the STATE, whichever occurs earlier, unless sooner terminated by the STATE or GRANTOR.

2. All other provisions of the Agreement shall remain unamended and in full force and effect as written.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be duly executed on the date first above written.

STATE OF HAWAI'I
DEPARTMENT OF EDUCATION

Kathaya S Matayoshi

Its Interim Superintendent

APPROVED AS TO FORM:

State of Hawaii

Deputy Attorney General

Date: 2-/6-/0

**GRANTOR:** 

Gentry Homes, Ltd., A Hawaii corporation

By Released Brust

Robert W. Brant Its President

Dawn Suyenaga

Its Vice President/Secretary

STATE OF HAWAI'I ) : SS. CITY AND COUNTY OF HONOLULU )

On this 18th. day of February, 2010 before me personally appeared KATHRYN S. MATAYOSHI, to me personally known, who, being by me duly sworn or affirmed, did say that such person executed the foregoing instrument as the free act and deed of such person, and if applicable in the capacity shown, having been duly authorized to execute such instrument in such capacity.

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Sharon K.M. Tong
Notary Public, State of Hawai'd
Print Name:

My commission expires: 11-27-2010

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Sharow The Dry	Date
Notary Signature NOTARY CERTIF	FIGATION

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STATE OF HAWAI'I ) SS.
CITY AND COUNTY OF HONOLULU )

on this 19th day of February , 2010 , before me personally appeared ROBERT W. BRANT and DAWN SUYENAGA to me personally known, who, being by me duly sworn or affirmed, did say that such person executed the foregoing instrument as the free act and deed of such person, and if applicable in the capacity shown, having been duly authorized to execute such instrument in such capacity.

MOTAL PRINT Public State of Hawai'i

State of Hawai'i

STATE OF HAWAI'I

MINING HAWAI MY COMMISSION expires: 10.26.1/

Doc Date: Marted #Pages: O

Name: SYLVEAT HAYASHI EIVEL Circuit

Doc. Description: FIVEL Amendment to the Gight of Entry Agreement for Ewa Malai Middle School

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NOTARY CERTIFICATION

Date

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# SECOND AMENDMENT TO THE RIGHT-OF-ENTRY AGREEMENT FOR EWA MAKAI MIDDLE SCHOOL

This Second Amendment, made to be effective as of July 1, 2010, by and between the State of Hawai'i DEPARTMENT OF EDUCATION, (hereinafter referred to as the "STATE"), and GENTRY HOMES, LTD., a Hawaii corporation, (hereinafter referred to as the "GRANTOR".)

## WITNESSETH

Whereas, the DOE and the GRANTOR entered into a Right of Entry Agreement on February 20, 2009, as amended by First Amendment dated February 19, 2010 (collectively referred to herein as the "Agreement") for property located at Honouliuli, District of Ewa, Oahu, State of Hawaii, Tax Map Key No. (1) 9-1-69-027 (hereinafter referred to as the "Property"), pursuant to which the STATE received temporary entry into the Property owned by the GRANTOR, to construct the public works project known the Ewa Makai Middle School (hereinafter referred to as the "Project".)

Whereas, the term of the Agreement ends on July 1, 2010, or upon transfer of title of the Property to the STATE, whichever occurs earlier; and

Whereas, construction of the school will not be completed by July 1, 2010; and

Whereas, the transfer of title to the Property to the STATE will not be completed by July 1, 2010; and

Whereas, the Agreement may be amended in writing signed by the parties;

NOW THEREFORE, the GRANTOR and the STATE agree to amend the Agreement as follows:

- 1. The first sentence of Section 6 of the Agreement is hereby amended and replaced with the following:
- 6. Term. The term of this Agreement shall commence on the effective date of this Agreement and shall end on August 31, 2010, or upon transfer of

title to the STATE, whichever occurs earlier, unless sooner terminated by the STATE or GRANTOR.

2. All other provisions of the Agreement shall remain unamended and in full force and effect as written.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be duly executed on the date first above written.

STATE OF HAWAI'I DEPARTMENT OF EDUCATION

By C

Kathrya S. Matayoshi

Its Interim Superintendent

APPROVED AS TO FORM:

State of Hawaii

Deputy Attorney General

Date: 7-8-10

**GRANTOR:** 

Gentry Homes, Ltd.,

A Hawaii corporation

Robert W. Brant

Its President

Dawn Suyenaga

Its Vice President/Secretary

STATI	e of	I'IAWAH		)		
					)	SS.
CITY	AND	COUNTY	OF	HONOLULU	)	

On this day of w, 20 0, 20 0, before me personally appeared ROBERT W. BRANT and DAWN SUYENAGA to me personally known, who, being by me duly sworn or affirmed, did say that such person executed the foregoing instrument as the free act and deed of such person, and if applicable in the capacity shown, having been duly authorized to execute such instrument in such capacity.

Notary Public, State of Hawai'i

State of Hawai'i

State of Hawai'i

A7-540 My commission expires: 10-26-2011

Name: SYLVIA T. HAYASHI FIRST Circuit

Doc Description: Second Annualment to the Light of Engage Annualment for Ewa Makai Middle School

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